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No. 98-1366

In The

Supreme Court of the United States

October Term, 1998

CECIL M. SULLIVAN, PAT SALMON & SONS, INC., TRISAL LEASING COMPANY, INC., LOUISIANA FARM BUREAU CASUALTY INSURANCE COMPANY AND LUFKIN INDUSTRIES, INC.,

Petitioners,

vs.

GENA MARIE DETILLIER,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fifth Circuit

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STATEMENT OF THE CASE

This matter arises out of an accident which occurred on April 30, 1988, while plaintiff-respondent, Gena Marie Detillier, was a guest passenger in a 1985 Nissan Maxima automobile. The vehicle in which respondent was riding rear-ended a moving 18-wheel tractor-trailer rig on Interstate Highway 10 in St. John the Baptist Parish, Louisiana. The tractor-trailer rig was owned by defendant, Trisal Leasing Company, Inc., leased by defendant, Pat Salmon & Sons, Inc., and driven by defendant, Cecil M. Sullivan.[1]

Respondent alleged in her suit that the Lufkin Industries, Inc. manufactured 1987 model trailer into which her host driver collided was defective and unreasonably dangerous due to its woefully inadequate rear bumper or underride protection device, which invaded the passenger compartment of the Nissan Maxima after impact. Because the rear bumper was too high from the ground to engage the front structures of smaller automobiles, the Nissan Maxima in which respondent was riding penetrated far underneath the trailer, which intruded into the occupancy space of the vehicle, striking respondent and essentially pulverizing her face.

Respondent sustained a brain injury, facial and skull fractures and a severe burn injury to her left foot and ankle. (R. 1786-1800). She also lost her left eye and her sense of smell. (R. 2102). The burn injury to her left foot and ankle, described as a "brush burn" by petitioner at page 4 of its petition, was actually a contact burn for

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[1] These three parties reached a settlement agreement with respondent and were dismissed prior to trial.

which she underwent several painful debridement procedures, as well as skin grafting procedures, including a complicated procedure involving the use of a vascularized skin graft from her scalp. (R. 1614-1624).

The Lufkin bumper that respondent's vehicle encountered was between twenty-six inches (R. 2210, 2225 and 2292) and twenty-seven and one-fourth inches (R. 1693) from the ground. Respondent's automotive engineering expert, Dr. Robert Ehrlich, testified that the underride guard should have been no more than twenty-two inches above the ground to prevent the type of intrusion which occurred. (R. 1981-82). Petitioner's corporate representative and chief engineer, LaVan Watts, admitted that Lufkin had an underride design with the guard nineteen inches above the ground as early as 1978. (R. 1680-82 and Exhibits P-15, 15B and 15C).

On May 5, 1995, a jury in St. John the Baptist Parish rendered a verdict finding the Lufkin trailer unreasonably dangerous, assigning Lufkin with 51 percent of the fault, and awarding total damages in the amount of $1,879,498.27 (R. 96-98). From this judgment, Lufkin appealed. The Louisiana Fifth Circuit Court of Appeal affirmed in all respects the liability findings of the trial court and also affirmed the trial court's ruling on federal preemption. Lufkin sought a Writ of Review from the

Louisiana Supreme Court, which was denied on October 16, 1998.[2]

REASONS FOR DENYING THE WRIT

Respondent's state-law tort claims are not expressly or impliedly preempted for the same ultimate reason that respondents' claims were held not preempted by this Court in *Freightliner Corp. v. Myrick*, 514 U. S. 280, 115 S.Ct. 1483, 131 L. Ed.2d 385 (1995), namely, because there was simply *no* federal regulation or standard governing underride protection devices applicable to the manufacture of the 1987 model Lufkin trailer involved in this case. There is no express preemption because, as will be shown *infra*, there was no federal standard or regulation. *Myrick, supra*, 115 S. Ct. at 1487.

As for implied preemption, this Court has recognized that a federal statute can implicitly preempt state law when:

(1) The scope of a statute indicates that Congress intended federal law to occupy a field exclusively;

(2) State law is in actual conflict with federal law;

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[2] Because petitioner's reference, at page 6 of its petition, to the narrow 4-3 vote on the writ denial by the Louisiana Supreme Court appears to indicate that the vote was on the federal preemption issue only, respondent points out that petitioner urged federal preemption as the third of three alleged errors. The first two assignments of error concerned factual findings of the jury and alleged legal errors under Louisiana law.

(3) It is impossible for a private party to comply with both state and federal requirements; or

(4) State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.*

Although the inclusion of an express preemption clause in a statute in and of itself does not foreclose the possibility of an implied preemption finding, it provides an inference that implied preemption is foreclosed. *Myrick, supra,* 115 S. Ct. at 1487-88.

Petitioner alleges that respondent's claims are impliedly preempted because they conflict with federal law. Again, however, in the absence of an applicable federal regulation or standard, there is nothing for respondent's state-law tort claims to conflict with. *Id.*

A. The Federal Motor Carrier Safety Act Does Not Apply To Manufacturers Such As Petitioner, Lufkin Industries, Inc.

Petitioner, at pages 7-8 of its petition, incorrectly asserts that 49 C.F.R. § 393.86, a Federal Motor Carrier Safety Regulation, was "applicable to the Lufkin trailer". This section was first issued in 1952 by the Bureau of Motor Carriers of the Interstate Commerce Commission (presently the Office of Motor Carriers of the Federal Highway Administration). It reads, in pertinent part, as follows:

393.86 Rear End Protection

Every motor vehicle, except truck-tractors, pole trailers, and vehicles engaged in driveaway-

> towaway operations, the date of manufacture of which is subsequent to December 31, 1952, which is so constructed that the body or the chassis assembly if without a body has a clearance at the rear end of more than 30 inches from the ground when empty, shall be provided with bumpers or devices serving similar purposes which shall be so constructed and located that: (a) The clearance between the effective bottom of the bumpers or devices and the ground shall not exceed 30 inches with the vehicle empty;

This regulation was issued pursuant to authority granted in 49 U.S.C. § 2505 (now 49 U.S.C. § 31136) which is contained in chapter 311 of title 49, entitled "Commercial Motor Vehicle Safety". The Federal Motor Carrier Safety Regulations ("FMCSR") issued pursuant thereto are contained in Subchapter B of Chapter III of Subtitle B of Title 49 of the Code of Federal Regulations. Part 390 thereof establishes the "general applicability, definitions, general requirements and information as they pertain to persons subject to this Chapter". 49 C.F.R. § 390.1.

FMCSR 390.3, establishing general applicability, provides, in pertinent part:

> (a) The rules in Subchapter B of this chapter are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce.

FMCSR 390.5 defines "employer" as meaning:

> Any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it, but such terms do not include the United States, any

> State, any political subdivision of a State, or an agency established under a compact between States approved by the Congress of the United States.

The term "motor carrier" is also defined therein as:

> A for-hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, this definition includes the terms employer, and exempt motor carrier.

FMCSR 393.1 provides for the scope of the rules contained in Part 393, which part includes the FMCSR 393.86 quoted above. It provides:

> Every employer and employee shall comply and be conversant with the requirements and specifications of this part. No employer shall operate a commercial motor vehicle, or cause or permit it to be operated, unless it is equipped in accordance with the requirements and specifications of this part.

Petitioner is neither an "employer" nor a "motor carrier" for purposes of applicability of the Federal Motor Carrier Safety Regulations to it. Petitioner is a truck trailer manufacturer. (R. 225, 251).

The non-applicability of Federal Motor Carrier Safety Regulations to truck manufacturers is well established:

> The ICC [Interstate Commerce Commission which originally issued 49 C.F.R. 393.86] did not

> have authority to regulate vehicle and component manufacturers when it issued the first rear underride protection requirements in 1952 and, consequently, had no authority to compel manufacturers to provide technical data on their products. 63 Fed. Reg. 26759, 26762 (1998).

The cited Federal Register entry is a Proposed Rule to amend FMCSR 393.86 to, among other things, lower the clearance from 30 inches down to 22 inches above the ground, as was suggested by respondent's expert, Dr. Ehrlich, at trial. This Proposed Rule, if adopted as a regulation, will be a companion to two Federal Motor Vehicle Safety Standards, to be discussed, *infra*, which went into effect on January 24, 1996, specifying, for the first time, underride protection clearance requirements applicable to *manufacturers* such as petitioner herein.

The available jurisprudence also supports the conclusion that Federal Motor Carrier Safety Regulations are not applicable to manufacturers. See, e.g., *Hagan v. Gemstate Mfg., Inc.*, 148 Or. App. 192, 195, 939 P.2d. 141, 143 (Or. App. 1997) ("These rules [49 C.F.R. § 393.86 and related rules] do not directly regulate vehicle manufacturers"); *Mottu v. Navistar Int'l Trans. Corp.*, 804 S.W. 2d 144, 147 (Tex. App. 14th Dist. 1990) ("It is clear that the Interstate Commerce Act and its associated federal regulations were intended to govern transportation of passengers and property. We find no indication that the statute or the rules are applicable to manufacturers of the vehicles used for that transportation; therefore, section 393.86 [49 C.F.R.] is not applicable to appellee or the matters at issue during the trial").

FMCSR 393.86 was discussed frequently at trial, by petitioner in an effort to establish the 30 inch clearance requirement as the appropriate standard of care, and by respondent, to point out that the 43 year old regulation was seriously outdated given the subsequent development of smaller vehicles which easily underrode the rear ends of tractor-trailers. Petitioner never claimed to be a motor carrier, much less offered any evidence tending to establish the same. In its petition to this Court, Lufkin has offers absolutely no support for its assertion that FMCSR 393.86 was applicable to it as a manufacturer when it built the trailer involved in this accident. This is because none exists. Hence, petitioner has not borne its burden of establishing preemption by the Federal Motor Carrier Safety Act or its regulations.

Even assuming, *arguendo*, that petitioner, although a manufacturer and not a motor carrier, was legally required to comply with FMCSR 393.86 at the time it built the 1987 Lufkin trailer involved herein, respondent's claim would still not be expressly or impliedly preempted. Any preemptive effect of FMCSR 393.86 would be governed by the Federal Motor Carrier Safety Act. Considering the Congressional intent behind this Act, the U.S. Fourth Circuit Court of Appeals held:

> Unquestionably, these Sections demonstrate, not only that Congress did not intend to occupy completely the field of safety regulations for the operation on interstate highways of commercial vehicles but also that it contemplated the continued application and enforcement of State rules or regulations which might not be inconsistent or "incompatible" with federal regulations. In effect, *Congress intended an accommodation with*

> *state regulation so long as that could be achieved without violating federal law or valid federal regulation.*
>
> *Special Carriers & Rigging Ass'n v. Virginia*, 795 F.2d 1152, 1156 (4th Cir.1986) (Emphasis added).

This utter lack of preemptive intent is reflected in the regulations themselves. The rule relative to the preemptive effect of Federal Motor Carrier Safety Regulations provides as follows:

> Except as otherwise specifically indicated, subchapter B of this chapter [i.e., Federal Motor Carrier Safety Regulations] is **not** intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto.
>
> 49 C.F.R. § 390.9 (Emphasis added).

And the part governing parts and accessories, which includes the regulation in dispute herein, states:

> Nothing contained in this subchapter shall be construed to prohibit the use of additional equipment and accessories, not inconsistent with or prohibited by this subchapter, provided such equipment and accessories do not decrease the safety of operation of the motor vehicles on which they are used.
>
> 49 C.F.R. § 393.3.

The test provided for preemption is simply whether the proposed state rule would "prevent full compliance" with the federal regulation. The preemption doctrine has

its roots in the Supremacy Clause of the U.S.Const. art. VI, cl. 2, which invalidates state laws that "interfere with, or are contrary to" federal law. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 2375 (1985). The standard proposed by respondent's expert is a bumper no higher than twenty-two inches. Because twenty-two is less than thirty, this would not hinder compliance with the federal regulation that requires that "[t]he clearance between the effective bottom of the bumpers or devices and the ground shall not *exceed* 30 inches with the vehicle empty." 49 C.F.R. § 393.86(a) (Emphasis added). Lufkin's argument to the contrary is illogical and wrong; the federal regulation does not preempt respondent's state tort law claims.

This is not the first time that a court has been called upon to address 49 C.F.R. § 393.86's preemptive effect. In *Garcia v. Rivera*, 541 N.Y.S. 2d 880 (N.Y. Sup. 1989), *rev'd on other grounds*, 553 N.Y.S. 2d 378 (N.Y.A.D. 1 Dept. 1990), *appeal denied*, 567 N.E. 2d 980, 566 N.Y.S. 2d 586 (N.Y. 1991), plaintiff was injured when his automobile under-rode a van trailer. The Court was faced with an implied preemption argument. The defendant analogized to several preemption cases regarding the National Traffic and Motor Vehicle Safety Act. The *Garcia* Court rejected this preemption analogy because 49 C.F.R. § 393.86 is not a Motor Vehicle Safety Regulation. The Court's analysis is correct in its entirety:

> [A]nalogies have their limitations. What is implicated here is the Motor Carrier Safety Act, the enabling legislation which from its outset has proceeded from an assumption of competing state regulations. For example, in section

206(c)(2) of the Motor Carrier Safety Act, as amended in 1984, the Secretary was directed before issuing any regulations, to "consider . . . (B) State laws and regulations pertaining to commercial motor vehicle safety in order to minimize unnecessary preemption of said State laws and regulations under the Act."

* * *

"Unquestionably. . . . Congress did not intend to occupy completely the field of safety regulations for the operation on interstate highways of commercial vehicles but also that it contemplated the continued application of State rules or regulations which might not be inconsistent or 'incompatible' with Federal regulations. In effect, Congress intended an accommodation with state regulations so long as that could be achieved without violating Federal law or valid Federal regulation." *Specialized Carriers & Rigging Assoc. v. Commonwealth of Virginia*, 795 F.2d 1152, 1156 (4th Cir. [1986]).

* * *

"Whatever compensation standard a state imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under Federal standards and to pay for the injury that results." *Silkwood [v. Kerr-McGee]*, 464 U.S. [238,] 264, 104 S.Ct. [615,] 629-30 [(1984)] (Blackmun, J., dissenting).

The Court moreover finds that state tort liability does not jeopardize the effectiveness of the Federal regulation, nor is there an impossibility of compliance with both Federal regulation and state common law standards of care. In the area of health and safety regulations, this

> Court is obliged to apply a presumption against preemption. [citation omitted]. Moreover, [defendant] cannot validly maintain that the purposes of the Act are undermined by state tort actions, as it is clear that the regulations are meant to be minimum standards, and not preemptive in effect.
>
> *Garcia*, 541 N.Y.S. 2d at 885-86.

Lufkin cites no authority in support of the argument that an unreasonable burden will be placed on trailer manufacturers. *Garcia* also addressed this point, holding:

> As to the alleged varying standards argument, no authority has been cited in support of the proposition that a jury finding that an ICC bumper that complied minimal [sic] with the minimal regulation, 49 CFR 397.86 [sic; 393.86], was nonetheless defectively designed, would thereby disrupt Federal efforts to ensure uniform safe design standards. If anything, the intention of the Federal agency appears to have been to encourage manufacturers to surpass the mandated Federal regulations, not use them as a shield against lawsuits.
>
> *Id.* at 887.

Thus, the Federal Motor Carrier Safety Act does not preempt respondent's claims because it does not apply to petitioner. Even assuming, *arguendo*, that it did, given the stated regulatory intent not to preempt when compliance with state requirements would not prevent full compliance with federal regulations, and given the fact that the compliance standard advocated at trial by respondent would not hinder compliance with the federal regulation,

petitioner has not borne its burden of establishing preemption on the merits by the provisions of the Federal Motor Carrier Safety Act.

B. Respondent's State Law Tort Claims Are Not Preempted By The National Traffic And Motor Vehicle Safety Act Of 1966 ("Safety Act").

Petitioner asserts respondent's claims are preempted by the Safety Act although, again, it offers no valid legal basis whatsoever in support of its assertion. The preemptive effect of the Safety Act is governed by its preemption provision which provides, in pertinent part:

> *Whenever a Federal motor vehicle safety standard established under this subchapter is in effect,* no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the *same aspect of performance* of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. 15 U.S.C. § 1392(d). (Emphasis added).[3]

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[3] 15 U.S.C. § 1397(k) provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Respondent, out of an abundance of caution, asserts that this "savings clause" does not permit petitioner to use a federal safety standard to immunize itself from state common-law liability. However, because no federal safety

In this case, there was no relevant motor vehicle safety standard in effect under the Safety Act when the subject trailer was manufactured by Lufkin in 1987. Pursuant to the authority granted in the Safety Act, the National Highway Traffic Safety Administration ("NHTSA") established "Federal Motor Vehicle Safety Standards" (FMVSS), located at 49 C.F.R. § 571.1 – 571.302. These standards, which, unlike the Federal Motor Carrier Safety Regulations, do in fact apply to vehicle manufacturers such as petitioner, cover myriad safety devices on vehicles ranging from roof crush resistance requirements to tires. However, there was absolutely no safety standard in effect in 1987 under the Safety Act applicable to the rear truck underride "aspect of performance" of a vehicle such as the trailer manufactured by petitioner herein.

Petitioner therefore cannot and does not point to any safety standard in effect under the Safety Act as being non-identical to respondent's tort law claims which would then be preempted. Instead, petitioner makes the quantum leap over to the Federal Motor Carrier Safety Regulations, specifically, FMCSR 393.86, alleging that its "shall not exceed 30 inches" provision preempts the 22 inch clearance advocated by respondent at trial because the two are not identical, in alleged violation of the mandate of the *Safety Act's* preemption provision, 15 U.S.C. § 1392(d). Petitioner's effort to mix "apples with oranges" is expressly foreclosed by the language of

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standard exists, there will in all likelihood be no occasion for this Court to reach this argument. See, e. g. *Myrick, supra*, 115 S. Ct. at 1487, n. 3.

§ 1392(d) itself: FMCSR 393.86 is not a "Federal motor vehicle safety standard established under this Subchapter". Hence, § 1392(d) extends no preemptive reach to respondent's common-law tort claims. FMCSR 393.86, as shown *supra*, does not apply to petitioner's trailer manufacturing business and, in any event, does not supply any basis for preemption under the Federal Motor Carrier Safety Act preemption provisions.

On January 24, 1996, NHTSA issued a Final Rule establishing two federal motor vehicle safety standards, 49 C.F.R. § 571.223 and 49 C.F.R. § 571.224, which, for the *first* time, imposed specific "rear end impact guard" requirements on truck and trailer manufacturers. 61 Fed. Reg. 2004 (1996). This Final Rule establishing the two new standards became effective on January 26, 1998. *Id.* The two new standards provide for, among other things, strength and energy absorption criteria for new rear underride guards. Also, safety standard 224 provides for a maximum vertical distance between the guard and the ground of 560 mm (22 inches), the same maximum clearance suggested by respondent's expert at trial. These two new safety standards will obviously be subject to the Safety Act preemption statute, although the Final Rule establishing them indicates that they do not have any retroactive effect. *Id.* at 2030.

Of particular import to the preemption issues in the case at bar is the discussion contained in the required Federalism analysis in the Final Rule at 61 Fed. Reg. 2029-30:

> Based on available information, the agency believes the federalism implications of this

> rulemaking are minimal. Nearly all states require underride protection guards for heavy trailers and semitrailers. Further, most states require that the guards meet certain configuration requirements, or that they be positioned in a certain location relative to the rear and sides of the vehicle. The rule will preempt State requirements for rear impact protection. However, the agency believes that federalism implications will be minor because the guards required by this rulemaking are not fundamentally different from those required by state law.
>
> * * *
>
> For practical purposes, the only effect that this rulemaking would have in these States is to require the guards to be tested and certified for strength and energy absorption.
>
> * * *
>
> This Federal rulemaking applies uniformly to all manufacturers and will insure that the competitive position of the manufacturers will not be significantly affected by these safety improvements.

Respondent respectfully submits that the above passage provides compelling evidence for the non-preemptive intent regarding rear underride guards existing prior to the promulgation of this Final Rule in 1996. Further, because vehicles manufactured after the effective date of these new safety standards, and in compliance therewith, will be shielded by the preemptive effect of these standards from any State requirements regarding underride protection devices which are not identical, the universe of

potential state common-law claims such as the present one alleging defective design of rear underride devices due to excessive clearance is finite and established. For this additional reason, respondent respectfully submits the concerns urged by petitioners, such as the need for uniformity, do not warrant this Court's attention.

CONCLUSION

For the reasons given above, the petition should be denied.

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